BRF 242

92-496

Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1992

RENE GARCIA, PETITIONER

VS.

UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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September 8, 1992

QUESTION PRESENTED FOR REVIEW

The Court of Appeals reversibly erred in not sustaining petitioner's point of error no. 3, which read (Pet.App. 43):

> The evidence was insufficient to support a two point enhancement of Rene Garcia's sentence for obstruction of justice.

LIST OF ALL PARTIES BELOW

The original parties before the United States Court of Appeals for the Fifth Circuit: The United States of America and Petitioners Rene Garcia and Jorge Rodrigo Garcia.

STATEMENT OF RELATED CASES AND PROCEEDINGS

This case has not previously come before this Court. Petitioners' undersigned counsel is not aware of any other related case pending before this Court.

IDENTITY OF DEFENSE COUNSEL BELOW

Petitioner Rene Garcia was represented at trial by attorney Jesus M. Alvarez of Rio Grande City, Texas. Attorney George R. Pitchford of McAllen, Texas represented Rene Garcia on appeal. Petitioner Jorge Rodrigo Garcia was represented at trial by attorney G. Alan Ramirez of Roma, Texas. Attorney Jseoph A. Connors III, represented Jorge Garcia on appeal.

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1992

RENE GARCIA, Petitioner

v.

THE UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

To the Honorable Supreme Court:

RENE GARCIA petitions for review of the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

On June 10, 1992, the United States Court of Appeals for the Fifth Circuit entered its opinion affirming the judgment of conviction in this case. United States v. Garcia, No. 91-8558. This opinion is unreported (Pet.App. 3).

JURISDICTION

On June 10, 1992, the United States Court of Appeals for the Fifth entered its opinion affirming the judgment of conviction in this case.

Jurisdiction of the Court is invoked under Section 1254(1), Title 28, United States Code.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The fifth amendment to the United States Constitution provides in pertinent part:

> No person shall ... be deprived of life, liberty, or property, without due process of law; ...

Sentencing Commission Guideline § 3C1.1 provides that:

> If the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense, increase the offense level by 2 levels.

STATEMENT OF THE CASE

A. Appeals Court's Jurisdiction

The court of appeals had jurisdiction of petitioner's direct appeal by virtue of 28 U.S.C. 1291.

B. Procedural History in District Court

The petitioner, Rene Garcia and Jorge Rodrigo Garcia were convicted by a jury of (1) conspiracy to possess with intent to distribute more than 50 kilograms of marijuana, in violation of 21 U.S.C. 846 and 841(a)(1) and (b)(1)(B); and (2) possession with intent to distribute more than 50 kilograms of marijuana, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B). The district court sentenced each defendant to concurrent terms of imprisonment of 72 months on each count, a $100 special assessment, and equal concurrent terms of supervised release -- five years for petitioner and six years for Jorge. Both defendants appealed. The Court of Appeals

for the Fifth Circuit affirmed the convictions.

C. Statement of the Facts:

On November 25, 1990, Louis Rocha, U.S. Border Patrol Agent, noticed a man, later identified as Jorge, near a white pickup on the side of the road about 20 miles from Carrizo Springs, Texas, on Farm to Market Road 2644. Rocha testified that he had offered assistance, but that the man identified as Jorge, had just answered that his truck had run out of gas, and that although his father and brother were in Eagle Pass, he preferred to walk rather than to have them called for assistance.

The individual identified as Jorge, left on foot. Agent Rocha returned to the truck and discovered that it was registered to a Francisco Barrera of the Guajalota Ranch in the La Grulla near Rio Grande City, Texas. As Rocha pulled his car next to the cab of the truck, he noticed that the window

was rolled down, the door was unlocked, binoculars and a pouch were on the seat, and a CB radio was partially under the seat. Rocha pulled off the road to allow three vehicles to pass, a red truck, a gray Suburban, and a car. Once behind the white truck, Rocha detected a strong odor of marijuana. The cover of a tool box in the truck was tied with twine and partially opened. Rocha testified that he saw exposed plastic wrappings; and when he opened the cover, he discovered 220 pounds of marijuana.

Rocha drove out in the direction the individual he identified as Jorge had walked, but Jorge was gone. Rocha went back to the white truck and radioed Agent Robert Gonzalez who was at the next intersection. A full description was given of the individual and the three vehicles who passed him on the road. Rocha later received a radio message that police officers had found

the described individual and would hold him at the Border Patrol until Rocha arrived to identify him.

Sheriff's Deputy Ramon Saenz had heard a radio report that two individuals had been seen in a red pickup at a convenience in Carrizo Springs. Deputy Saenz stopped the red truck and asked to see identification. The red truck was registered to Rene Garcia's father-in-law, Conraldo Villarreal. Rene told Saenz that Jorge had been with him since the brothers left their mother's home in Rio Grande City that morning.

Agent Gonzalez joined Deputy Saenz and questioned Jorge and Rene. Apparently both men told Gonzalez that they were looking for a mechanic to fix Jorge's vehicle, but that they were also in the area to do some hunting. There was a deer rifle, a CB radio, and a bag of deer corn in the truck. There was also a deer license issued to Rene.

Rene Garcia testified that he and his brother Rodrigo were going to visit their father in Eagle Pass and possibly go hunting at his friend's uncle's ranch. Rene borrowed his father-in-law's pickup for this purpose. They left from their mother's home on November 25th. When Rene and Jorge got to Carrizo Springs, they went looking for a place to try to purchase some gifts for his father's two daughters. They were on their way to Wal-Mart when they were stopped by a police car. Rene and Jorge answered the deputy's questions and the Border Patrol Agents who arrived later. Rene and Jorge followed the agents to the Border Patrol Station. Both were again interrogated by other agents, and again, Rene told him that he and his brother were on their way to Eagle Pass to see their father, and maybe do some hunting. The only time he and Jorge separated on the trip was when Rene went to the bathroom at the little convenience store

in Laredo when they stopped to gas up. It was not true that Jorge was driving that white truck and Rene was somehow involved. On November 25, 1990, Rene and Jorge did not conspire to possess marijuana with intent to distribute it. They were never in possession of that marijuana. On November 25, 1990, Rene did not even see his brother Jorge in possession of that marijuana.

Rene Garcia's sentence was enhanced two (2) points after the United States Probation Officer recommended to the trial judge that since the jury found Rene guilty on both counts of the indictment, his trial testimony should be considered "perjury".

SUMMARY OF ARGUMENT ON REASONS FOR REVIEW

Under Supreme Court Rule 10.1(a), the Supreme Court should exercise its judicial discretion and allow the writ in this case because the Fifth Circuit Court of Appeals has rendered a decision consistent with United States v. Pattan, 931 F.2d 1035, 1043

(5th Cir. 1991), but in conflict on the same matter with the decision in United States v. Dunnigan, 944 F.2d 178 (4th Cir. 1991), cert. filed, 60 U.S.L.W. 3600 (1992).

ARGUMENT ON QUESTION

This issue's resolution turns on whether the Fifth Circuit's review of the application of Sentencing Guidelines § 3C1.1 adequately safeguards an accused's Fifth Amendment right to testify. The Fifth Circuit, as other circuits, hold that the findings of fact of the district court are reviewed under the "clearly erroneous" standard. United States v. Mourning, 914 F.2d 699, 704 (5th Cir. 1990). However, as pointed out by the Fourth Circuit in Dunnigan, a guilty verdict will never be "clearly erroneous."

> We are not satisfied that there are enough safeguards in place to prevent this enhancement from unfairly coercing defendants, guilty or innocent, into remaining silent at trial. Other circuits have reviewed the district court's

> finding of untruthfulness under a "clearly erroneous" standard. Batista-Polaneo, 927 F.2d at 22; Matos, 907 F.2d at 276; Wallace, 904 F.2d at 605; Beaulieu, 900 F.2d at 1540; O'Meare, 895 F.2d at 1220. Of course, in light of the jury's verdict of guilt, the district court's finding will never be clearly erroneous" where the verdict is sustainable; if the verdict cannot be supported, the sentencing finding will of course be moot. Our review of these enhancements would therefore be an empty ritual. Dunnigan at 185.

The Fourth Circuit was correct in asserting that the two level enhancement as applied in Dunnigan went against the longstanding precedent in United States v. Grayson, 438 U.S. 41 (1978). Under the "old" sentencing law, a court could consider the defendants "perjury" at the time of trial, even though the defendant was neither charged with, nor convicted of perjury. The Supreme Court was also careful to state that:

> Nothing we say today requires a sentencing judge to enhance, "in some wooden or reflex fashion," the sentences of all defendants

> whose testimony is deemed false. Rather, we are reaffirming the authority of a sentencing judge to evaluate carefully a defendant's testimony on the stand, determine - with a consciousness of the frailty of human judgment - whether that testimony contained willful and material falsehoods, and, if so, assess in light of all the other knowledge gained about the defendant the meaning of that conduct with respect to his prospects for rehabilitation and restoration to a useful place in society.

The Fourth Circuit was correct in its reasoning that this automatic enhancement resulted in punishment for the additional crime of obstruction of justice without an indictment or trial. Dunnigan at 183-184.

Up to now, only the Fourth Circuit has decided that § 3C1.1 has an unconstitutional chilling effect on the Fifth Amendment right of a defendant to testify. There are other circuits which have held that an obstruction of justice enhancement erased solely upon a verdict of guilt is not permissible. In United States v. Martinez, 922 F.2d 914 (1st

Cir. 1991), the court held that an obstruction of justice enhancement based upon a jury verdict alone was punishment for exercising right to testify in his own defense. In United States v. Husky, 924 F.2d 223 (11th Cir. 1991), the court held that an independent finding of willful perjury was necessary rather than relying solely pon jury verdict. In United States v. Willis, the court 940 F.2d 1136 (8th Cir. 1991) held that the obstruction of justice enhancement cannot be given solely because jury disbelieves defendant, the district court has to make an independent finding. In United States v. Corn, 956 F.2d 135 (7th Cir. 1992), the court held that the lower court should not have automatically enhanced the sentence of a defendant who takes the stand and is convicted. In United States v. Lozoya-Morales, 931 F.2d 1216 (7th Cir. 1991), the Court held that imposing the enhancement penalty automatically from a

jury verdict impinges on the right to testify in defendant's behalf. In United States v. Davis, 938 F.2d 744 (7th Cir. 1991), the court affirmed the enhancement by finding that the district court had made an independent finding of perjury and did not rely solely upon the jury verdict in affirming the enhancement. In United States v. Ogbeifun, 949 F.2d 1013 (8th Cir. 1991), the court upheld the application of the two level enhancement because because the district court head made an independent determination of false testimony rather than defendant's inability to covince the jury of his innocence.

As § 3C1.1 guideline was applied in this case, there can be no doubt that this two level enhancement goes against Grayson's prohibition against "wooden or reflexive" reliance upon a guilty verdict and its inconsistent with the First, Seventh, Eighth, and Eleventh Circuits application of

§ 3C1.1 in United States v. Martinez, 944 F.2d 914 (1st Cir. 1991); United States v. Lozoya-Morales, 931 F.2d 1216, 1218-1220 (7th Cir. 1991); United States v. Davis, 938 F.2d 744, 747 (7th Cir. 1991); United States v. Corn, 956 F.2d 135, 136 (7th Cir. 1992); United States v. Willis, 940 F.2d 1136, 1140 (8th Cir. 1991); United States v. Seabolt, 958 F.2d 231, 233 (8th Cir. 1992); United States v. Ogbeifun, 949 F.2d 1013, 1014 (8th Cir. 1991) and United States v. Husky, 924 F.2d 223, 225 (11th Cir. 1991).

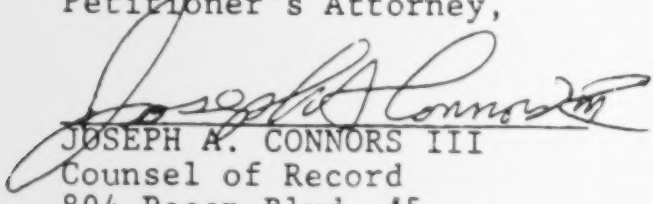
The district court made no independent findings of fact. It was obvious that it had placed great weight on the jury verdict in determing that Rene Garcia had testified falsely at trial and that the two level enhancement was necessary.

CONCLUSION

For the foregoing compelling reason, this Court should grant this petition for writ of certiorari.

DATED: September 8, 1992.

Respectfully submitted by
Petitioner's Attorney,



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